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that the firm did business for a longer period in any other district, we must, for the purposes of this proceeding, regard the petition as containing enough to confer upon the court jurisdiction of the application.

We discover no error in the judgment of the District Court and it is affirmed.

Supreme Court of Kansas.

WILLIAM CLOUGH ET AL. *v.* CHARLES A. HART ET AL.

Where a written contract between a county and an individual shows upon its face that it was made by the county for the professional services of the individual as an attorney and counsellor at law, which services are such as the law requires to be performed by the county attorney, such contract is *prima facie* void.

Where a written contract between a city of the first class and an individual shows upon its face that it was made by the city for the professional services of the individual, as an attorney and counsellor at law, which services are such as the law requires to be performed by the city attorney, such contract is *prima facie* void.

Where the petition of the plaintiff sets forth such a contract as a foundation for a decree for the specific performance of such contract, but does not set forth any facts which would show that such contract is not void, such petition does not state facts sufficient to constitute a cause of action.

THIS was an action to compel the specific performance of two certain contracts, and also for other relief not necessary to mention. One of said contracts was made between the plaintiffs and the city of Leavenworth, and the other contract was made between the plaintiffs and the county of Leavenworth. The other facts are stated in the opinion of the court, which was delivered by

VALENTINE, J.—The plaintiffs made the City of Leavenworth, the County of Leavenworth, the Missouri River Railroad Company, the Leavenworth, Atchison, and North-Western Railroad Company, and the thirty-six individual persons named in the title of the case, parties defendants; and, while the plaintiffs asked relief against all the defendants, yet their whole case depended upon the specific performance of the contracts.

The first and principal question, then, for us to consider is, whether their contract was valid or not. The defendants raised the question of their validity in the court below by demurring to the plaintiff's petition. The court below sustained the demurrer, and the plaintiffs now bring the question to this court for review.

The plaintiffs alleged in their petition below that, "on the 16th

day of November 1868, the county of Leavenworth aforesaid of the one part, at and with the consent of the county attorney of said county, made and entered into a certain written contract, of that date, with these plaintiffs, parties as aforesaid of the other part, of which written contract the following is a copy, to wit:—

“ This article of agreement, made and entered into this 16th day of November, A. D. 1868, by and between Clough & Wheat, of the one part, and the County of Leavenworth, of the other part, Witnesseth, that, whereas the County of Leavenworth has two hundred and fifty thousand dollars of the capital stock of the Missouri River Railroad Company, and, as such stockholder, claims certain rights against said railroad company, and those persons who claim to have purchased that tract of land known as the ‘Diminished Delaware Reserve,’ under a treaty with the Delaware Indians, and the said county is desirous of employing said Clough & Wheat as attorneys to render such assistance in enforcing such claims as they properly and reasonably can.

“ Now for that purpose the county of Leavenworth, in the state of Kansas, hereby undertakes and promises to and with said Clough & Wheat to pay them the sum of twenty-five hundred dollars, twelve hundred and fifty dollars thereof now, six hundred and twenty-five dollars thereof one year from this date, and six hundred and twenty-five dollars thereof two years from this time; if the litigation ends at any time within such two years, then immediately all of said two thousand five hundred dollars then unpaid shall be due and paid immediately. And for the same consideration said county hereby further undertakes and promises to and with said Clough & Wheat, to pay them for such services the value of three per cent. of all the said county has or may obtain as such a stockholder as aforesaid, and to assign and transfer three per cent. in amount of all the stock it has in said company to said Clough & Wheat when thereto requested. And the said Clough & Wheat, on their part, undertake and promise to and with said county, to perform such services as those above mentioned for the consideration aforesaid.

“ It is understood and agreed by and between the parties hereto, that the County of Leavenworth will pay one-half of all the travelling expenses, including fare, and all hotel and printing bills by said Clough & Wheat, necessarily or properly incurred

or paid in, about, or in consequence of attending to any of the matters aforesaid, or any suits or proceedings in relation thereto."

"In testimony whereof, the parties aforesaid have hereunto subscribed their names, the said Clough & Wheat in their own proper person, and the county of Leavenworth, by its agent, attested by the clerk of said county, and the seal thereof, signed in duplicate.

"CLOUGH & WHEAT.

"The County of Leavenworth, by B. B. MOORE,
"Chairman Board Co. Comm'rs.

"Attested by the undersigned, County Clerk of Leavenworth county, under my hand and the seal of said county.

"OLIVER DIEFENDORF, County Clerk.

["Seal of Leavenworth County,
"5 cents Int. Rev. Stamp cancelled.]

"And that the said county then had and owned two hundred and fifty thousand dollars paid-up stock in and to the capital stock of the Missouri River Railroad Company.

"And said plaintiffs further aver that they have duly performed all the conditions of said contract on their part. And that on December 7th 1868, these plaintiffs requested the county of Leavenworth aforesaid to assign and transfer three per cent. of the stock by it owned and mentioned in said contract to these plaintiffs, but said county then neglected and refused so to do.

"And plaintiffs further aver, that the several defendants herein knew and had notice of the making of the contracts aforesaid, at the time when the same were respectively made, and from thence hitherto."

The allegations of the petition with respect to the contract made with the city of Leavenworth are the same as those with the county, and hence it is not necessary for us to repeat them. The two contracts are in form identical. That, however, made with the city is dated October 20th 1868.

These contracts, in our opinion, are void, or rather they appear upon their face to be void, and there is no allegation in the petition that shows them to be otherwise than void.

The county and city of Leavenworth attempt, by their contracts, to employ the plaintiffs to perform precisely what it is the duty under the law of the county and city attorneys respectively to perform. They completely ignore the law. We have exam-

ined all the authorities referred to by counsel for both plaintiffs and defendants, to wit: 2 Sandf. S. C. 460; 10 Bosw. 544, 545; 9 Id. 433, 434; 23 Barb. 370; 33 Id. 603; 59 E. C. L. R. 534; 12 Wis. 509, 512; 17 Iowa 413; 11 Ohio St. 190; and we have also examined the following other authorities, not referred to by counsel, to wit: *Smith v. Mayor of Sacramento*, 13 Cal. 531; *Hornblower v. Dunden*, 35 Cal. 664; *Parker v. Williamsburg*, 13 How. Pr. 250; *Carroll v. St. Louis*, 12 Mo. 444.

Scarcely one of these authorities is applicable under our statutes, and to the particular case at bar.

While the language of some of the decisions would seem to cover this case, yet the precise question involved in this case was not before the courts rendering such decisions. The cases of *Carroll v. St. Louis*, 12 Mo. 444, and *Orton v. The State*, 12 Wis. 509, are as near applicable as any of them.

Before proceeding further, we will say that it will be admitted that a county is a corporation, or at least a *quasi* corporation, and as such could in any case employ counsel, if no counsel had otherwise been provided for them by law. It will even be admitted, for the purposes of this argument, that in states where no county attorney is elected, but where a district attorney is elected for several counties, whose principal duty is to attend to *state cases*, to prosecute criminal actions in his district, but whose duty it also is secondarily to appear and prosecute or defend for the several counties within his district, such counties are not bound to depend upon such district attorney, but may employ counsel of their own to take more especial care of the interest of the county. It will also be admitted that in any case other counsel than the county attorney may appear and prosecute or defend for a county under or for the county attorney, or to assist him, looking of course to the county attorney, if to any one, for compensation.

It will also be admitted that a county may employ other counsel to perform such of its legal business as the law does not authorize or require the county attorney to perform, and that there may be such business will not be denied. And it will also be admitted that a county may, with the consent of the county attorney, employ such assistance for the county attorney as the county attorney may *actually need*.

It is possible that there may be other cases where a county may

employ other counsel than the county attorney, but we now cannot conceive of any other.

The county attorney is elected by the people of the county, and for the county: Gen. Stat. 283, § 65. He is the counsel for the county, and cannot be superseded or ignored by the county commissioners. His retainer and employment is from higher authority than the county commissioners. The employment of a general attorney for the county is not by the law put into the hands of the county commissioners, but is put into the hands of the people themselves.

The county attorney derives his authority from as high a source as the county commissioners do theirs, and it would be about as reasonable to say that the county attorney could employ another board of commissioners to transact the ordinary business of the county, as it is to say that the county commissioners can employ another attorney to transact the ordinary legal business of the county. Both would be absurd. It is the duty of the county attorney to give legal advice to the county commissioners, and not theirs to furnish legal advice to or for him.

Some of the provisions of the statute relating to the county attorney, are as follows. See Gen. Stat. 283 to 286.

“Sect. 136. It shall be the duty of the county attorneys to appear in the several courts of their respective counties, and prosecute or defend on behalf of the people all suits, applications or motions, civil or criminal, arising under the laws of this state, in which the state or their county is a party interested.”

“Sect. 137. Each county attorney shall * * * also prosecute all civil suits before such magistrate (any magistrate of his county) “in which the county is a party interested.”

“Sect. 138. The county attorneys shall without fee or reward give opinions and advice to the board of county commissioners, and other civil officers of their respective counties, when requested by such board or officers, upon all matters in which the county or state may have an interest.”

“Sect. 139. The county attorneys of the several counties of the state shall be allowed by the board of county commissioners, as compensation for their services, a salary as follows * * * In counties of over twenty-four thousand inhabitants, not more than three thousand dollars. County attorneys shall be allowed ten

per cent. on all moneys collected by them in favor of the state or county." * * *

"Sect. 140. No county attorney shall receive any fee or reward from or on behalf of any prosecution or other individuals, except such as are allowed by law for services in any prosecution or business to which it shall be his official duty to attend; nor be concerned as attorney or counsel for either, other than the state or county, in any civil action, depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend." * * *

"Sect. 141. The county attorney may appoint a deputy, who shall perform all the duties of such county attorney during his absence or sickness."

"Sect. 142. In the absence, sickness, or disability of both the county attorney and his deputy, any court before whom it is his duty to appear may appoint an attorney to act as county attorney, by order to be entered upon the minutes of the court."

What we have said with reference to county attorneys will also apply to city attorneys. The statutes relating to city attorneys will be found in the General Statutes as follows: p. 131, § 11; p. 145, § 71; p. 152, § 110, par. 7.

The city attorney receives by law the sum of \$1800 per annum for his services from the city, and while the city council have no power at all to supersede him, as they have attempted to do in this case, they cannot even make an additional allowance for the assistant counsel, unless concurred in by three-fourths of the members elected to the council: Gen. Stat. 152, § 110, par. 7.

From the foregoing we think it necessarily follows:—

1. Where a written contract between a county and an individual shows upon its face that it was made by the county, for the professional services of the individual as an attorney and counsellor at law, which services are such as the law requires to be performed by the county attorney, such contract is *prima facie* void.

2. When a written contract between a city of the first class and an individual shows upon its face that it was made by the city for the professional services of the individual as an attorney and counsellor at law, which services are such as the law requires to be performed by the city attorney, such contract is *prima facie* void.

3. Where the petition of the plaintiff sets forth such a contract as mentioned above, as a foundation for a decree for the specific performance of such contract, but does not set forth any facts which would show that such contract is not void, such petition does not state facts sufficient to constitute a cause of action.

We suppose it will be conceded that as a rule when a contract appears to be void upon its face, if there should be any fact outside of the contract which would render the contract valid, such facts should be set forth in the pleading of the party claiming the contract to be valid. If so, then as said contract appears to be void, it will devolve upon the plaintiffs to set forth in their petition such facts, *if there be any such*, as will render the contract valid.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurred. BREWER, J., did not sit.

United States Circuit Court. District of Nebraska.

JESSE L. FROST *v.* UNION PACIFIC RAILROAD COMPANY.

Where a servant, under the orders and control of another superior servant, is directed by the latter to do an act not in the usual course of his duties, and, while so engaged, is injured by the negligence of the superior, the master is liable to the servant injured.

THIS was an action brought by the plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm, while in the employment of the defendants.

DILLON, Circuit J., charged the jury as follows:—

Gentlemen of the jury: That the plaintiff's son was employed by the defendants, and that by an accident his arm was torn off by machinery in the car shop of the defendants, are facts which are admitted. Evidence has been offered tending to show that the defendants, in their works in this city (Omaha), had a car department outside. Mr. Gamble was the superintendent; that under him, and having immediate control in the shop, was a foreman—Mr. Ballou; that under the foreman there were various sets, or, as witness called them, "gangs of men," under the immediate